17-126

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 127.

GEORGE F. POTTER, DORILUS MORRISON, ELI B. AMES, WILLIAM S. KING, RUFUS J. BALDWIN, AND WILLIAM WINDOM, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 27, 1879.

O K.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States of America, plaintiff, and George F. Potter, Dorilus Morrison, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom, defendants, a manifest error hath happened, to the great damage of the said defendants, as is said; we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fourth day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

2 UNITED STATES OF AMERICA,
District of Minnesota, ss:

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings, whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, marked A, as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 24 day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

3 Circuit court of the United States, district of Minnesota.

THE UNITED STATES OF AMERICA, PL'FF,
vs.
GEORGE F. POTTER, DORILUS MORRISON, ELI B. AMES, WILLIAM S. KING, RUFUS J. BALDWIN, and WILLIAM WINDOM, def'ts.

The plaintiff, for its complaint, alleges that heretofore, to wit, on the 9th day of June, A. D. 1870, the defendant George F. Potter, by commission dated on that day, was appointed by the President of the United States, pursuant to law, receiver of public moneys in the Pembina land district, Dakota Territory, for four years from June 7th, A. D. 1870, and thereupon entered upon the discharge of his duties as such officer, and continued to occupy said office for a long time thereafter, to wit, until June 30th, 1874.

That all of the defendants above named, in consideration of the premises, on the 3d day of August, A. D. 1870, executed and delivered to the plaintiff their certain joint & several bond and writing obligatory, a true
4 copy whereof is hereto attached and made a part of this complaint.

That the defendant George F. Potter did not, after the delivery of said bond, faithfully execute and discharge the duties of his office aforesaid, as receiver of public moneys, according to law, but, on the contrary, after the delivery of said bond and prior to June 30th, A. D. 1874, there legally came into the hands of said Potter, as such receiver of public moneys, the sum of eight thousand five hundred sixty-four and $\frac{77}{100}$ dollars, all of which said Potter has wholly refused and neglected and still does neglect and refuse to account for or pay over to plaintiffs, and all of which is still unlawfully detained by him to his own use.

Wherefore plaintiff demands judgment against defendants for the said sum of $8,564.77, with interest thereon from June 30th, A. D. 1874, at the rate of six per cent. per annum, and for costs.

WM. W. BILLSON,
U. S. Dist. Att'y.

Copy of bond referred to in and made a part of the foregoing complaint.

Know all men by these presents, that we, George F. Potter, of La Crescent, Minnesota, as principal, and Dorilus Morrison, of Minneapolis,
5 Hennepin County, Minnesota; William Windom, Winona County, Minnesota; William S. King, Eli B. Ames, and Rufus J. Baldwin, each of the said city of Minneapolis, Hennepin County, Minnesota, as sureties, are held and firmly bound unto the United States of America in the full and just sum of twenty-five (25,000) thousand dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents; sealed with our seals and dated this 3d day of August, in the year of our Lord one thousand eight hundred and seventy.

The condition of the foregoing obligation is such that whereas the President of the United States hath, pursuant to law, appointed the said George F. Potter to be receiver of public moneys in the Pembina land district,

Dakota Territory, for four years from the 7th day of June, 1870, under commission dated the 9th day of June, 1870: Now, therefore, if the said George F. Potter has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge,
6 all the duties of the said office according to law, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue.

GEORGE F. POTTER. [SEAL.]
DORILUS MORRISON. [SEAL.]
WILLIAM WINDOM. [SEAL.]
WILLIAM S. KING. [SEAL.]
ELI B. AMES. [SEAL.]
RUFUS J. BALDWIN. [SEAL.]

Signed, sealed, and delivered in presence of—
CHARLES C. COMBS, of Minneapolis, Minn.
FENTON ROCKWELL, " " "
GEORGE M. C. BRACKETT, " " "
SAMUEL ARTHUR HARRIS, " "
SAMUEL G. ROBERTS, " "
MADIM A. MOTEY, " "
MARSH P. HAWKINS, " "
HENRY J. HORN, of St. Paul, Ramsey Co., Minn.
THOMAS LOWRY, of Minneapolis, Minn.
SCHUYLER H. MATTISON, " "
WILLIAM MOOR, " "
EDWIN H. HERRICK, " "

(Endorsed:) Filed April 18, 1876. H. E. Mann, clerk.

7 UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify that I served the annexed summons on the therein named defendant, George F. Potter, personally, by handing to and leaving with him a true copy thereof at La Crescent, in said district, on the 3d day of May, 1876.

R. N. McLAREN,
U. S. Marshal.
By F. M. LUTHER,
Deputy.

Service, 2.00; 138 mileage, 8.28—10.28; 9.75 fees—20.03.

8 DISTRICT OF MINNESOTA, *ss:*

I hereby certify that I served the annexed summons on the therein named defendants, Dorilus Morrison, Eli B. Ames, Wm. S. King, & Rufus J. Baldwin, personally, by handing to and leaving with each of them a true copy thereof, at Minneapolis, in said district, on the 21st day of April, 1876. William Windom not in this district.

R. N. McLAREN,
U. S. Marshal.

Fees, 9.75

9 *Summons.*

UNITED STATES OF AMERICA,
District of Minnesota, ss:

In the circuit court of the United States for the district of Minnesota.

THE UNITED STATES OF AMERICA
against
GEORGE F. POTTER, DORILUS MORRISON, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom.

The President of the United States of America to the defendants above named, greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey, and State of Minnesota, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will take judgment against you for the sum of eight thousand five hundred and sixty-four dollars and seventy-seven cents, with interest thereon from June 30, A. D. 1874, at the rate of six per cent. per annum, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this eighteenth day of April, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence one hundred' year.

[SEAL OF COURT.] H. E. MANN, *Clerk.*

WM. W. BILLSON,
Plaintiff's Attorney.

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that the within is a true copy of the original summons delivered to me for service.

, *U. S. Marshal.*

(Indorsed:) United States circuit court, district of Minnesota. No The United States, plaintiff, vs. George F. Potter et al., defendants. Summons. Filed May 13, 1878. H. E. Mann, clerk. W. W. Billson, plaintiff's attorney.

10 UNITED STATES OF AMERICA,
District of Minnesota:

In the circuit court of the United States for the district of Minnesota.

THE UNITED STATES OF AMERICA
against
ELI B. AMES, IMPLEADED WITH GEO. F. POTTER and others.

Eli B. Ames answers the complaint in this action and says: He admits that he signed a bond as surety for George F. Potter as receiver of a land

office of the United States, but as to whether the contents of said bond or the obligations thereof have been set forth in the said complaint herein he has no knowledge or information sufficient to form a belief. And as to whether the said George F. Potter collected moneys as stated in the complaint, or failed to pay over moneys collected, or was a defaulter, this defendant has no knowledge or information sufficient to form a belief. And as to whether there is any or what sum due to the United States from the said Potter, or owing on or by virtue of said bond this defendant has no knowledge or information sufficient to form a
11 belief. And this defendant alleges upon his information and belief that if any moneys are due to the United States from the said George F. Potter the same were collected fraudulently, and not in pursuance of his official authority as receiver or disbursing agent of the United States, and without the concurrence of the register of the United States land office of the district, and at places other than the location of the said land office.

ELI B. AMES.

STATE OF MINNESOTA,
County of Hennepin, ss:

Eli B. Ames, being duly sworn, doth depose and say that he is a defendant in the foregoing action, and that the answer is true of his own knowledge, except as to the matters stated on information and belief, and as to those matters he believes it to be true.

ELI B. AMES.

Subscribed & sworn to before me this 11th day of May, 1876.
[SEAL.] BUDD REESE,
U. S. Commissioner Circuit Court Dist. of Minnesota.

12 (Endorsed:) Filed May 12, 1876. H. E. Mann, clerk, by Wm. A. Spencer, deputy.

Answer.

UNITED STATES OF AMERICA,
District of Minnesota:

In the circuit court of the United States for the district of Minnesota.

THE UNITED STATES OF AMERICA
against
RUFUS J. BALDWIN, IMPLEADED WITH GEORGE F. Potter and others.

Rufus J. Baldwin answers the complaint in this action, and says he admits that he signed a bond as surety for George F. Potter, as receiver of a land office of the United States, but as to whether the contents of the said bond or the allegations thereof were, as set forth in the said complaint he has no knowledge or information sufficient to form a belief. And as to whether the said George F. Potter collected moneys as stated in the complaint, or failed to pay over moneys collected, or was a defaulter, this de-

fendant has no knowledge or information sufficient to form a belief.
13 And as to whether there is any or what sum due to the United States from the said Potter, or owing on or by virtue of said bond, this defendant has no knowledge or information sufficient to form a belief. And this defendant alleges upon his information and belief, that if any moneys are due the United States from the said George F. Potter, the same were collected fraudulently and not in pursuance of his official authority as receiver or disbursing agent of the United States, and without the concurrence of the register of the United States land office of the district, and at places other than the location of the said land office.

RUFUS J. BALDWIN.

STATE OF MINNESOTA,
Hennepin County, ss:

Rufus J. Baldwin being duly sworn, deposes and says that he is a defendant in the foregoing action, and that the answer is true of his own knowledge, except as to the matters stated on information and belief, and as to those matters he believes it to be true.

RUFUS J. BALDWIN.

Subscribed & sworn this 11th day of May, 1876, before me.
[SEAL.] BUDD REESE,
U. S. Commissioner Circuit Court, District of Minnesota.

(Endorsed:) Filed May 12, 1876. H. E. Mann, clerk.

14 Circuit court of the United States, district of Minnesota.

THE UNITED STATES OF AMERICA, pl'ff,
vs.
GEORGE F. POTTER, DORILUS MORRISON, ELI B. AMES, WILLIAM S. KING, RUFUS J. BALDWIN, and WILLIAM WINDOM, def'ts.

Defendants Morrison, King, and Windom, separately answering the complaint of plaintiff in above-entitled action, admit the appointment of said Potter as receiver of public moneys, and that he entered upon the discharge of his duties as in said complaint alleged, but as to how long said Potter continued to occupy said office said defendants have not knowledge or information sufficient to form a belief, and therefore leave plaintiff to make such proof as it may be advised.

Defendants admit the execution and delivery of the bond as in said complaint alleged, but as to whether said Potter did or not faithfully execute or discharge the duties of his said office they have not knowledge nor information sufficient to form a belief.

As to whether there ever legally or otherwise came into the hands
15 of said Potter as such receiver, and which he has refused or neglected to account for or pay over the sum of eight thousand five hundred sixty-four $\frac{77}{100}$ dollars, or any other or greater sum than one thousand three hundred and eleven $\frac{77}{100}$ dollars, defendants have not knowledge nor information sufficient to form a belief, and therefore leaves plaintiffs to make such proof in that behalf as it may be advised.

And further answering, def'ts are informed and believe, and upon information and belief allege, that from and after the month of October, 1873, there was no register at the land-office in the said Pembina land district, nor any legal deputy nor clerk; that the register of the land-office for said land district was absent from his office and from said land district during all the time said Potter remained receiver of public moneys therein from and after said month of October, 1873, and left no legal deputy nor clerk in his place; that all entries or pretended entries of land made in said land district during the time of the absence of said register, was without authority of law and void, and all moneys received by said Potter for
16 such entries were received by him wrongfully and unlawfully, and are not never were the property of plaintiff, nor is plaintiff in any way entitled thereto.

Whereupon said defendants demand that they be hence dismissed without day, and for their costs.

BRADLEY & MORRISON,
Def'ts Att'ys.

(Endorsed:) Oct. 4, 1876. H. E. Mann, clerk.

Circuit court of the United States, district of Minnesota.

THE UNITED STATES OF AMERICA
vs.
GEORGE F. POTTER, RUFUS J. BALDWIN, Dorilus Morrison, Wm. S. King, Eli B. Ames, & William Windom.

The above-named defendants, except George F. Potter, for their amended answer to the complaint of the plaintiff in the above-entitled action, deny that they ever signed the bond stated in said complaint, or executed
17 the same in manner or form as alleged therein, or otherwise than as is hereinafter stated and admitted. They aver that they were separately requested to sign a paper which was a blank form and wholly uncompleted of the bond of said Potter as receiver of the United States land-office at Pembina; that they did so sign said paper, but they aver that at the time said signatures were appended to said bond it was a printed or written blank form of bond, and was not filled up, and did not contain the names or residences of the sureties or any of them, and they allege on information and belief that it did not contain the amount for which said bond was given, or the penalty of said bond, but was blank as to all said parts, and that the same was, after the same was so signed by the sureties thereto, the above-named defendants, filled up in the particulars above stated, to wit, by the writing into said paper the names and residences of said sureties, and the penalty or amount of said bond, in the absence of said sureties and without their knowledge or consent, and by some person un-
18 known to the said sureties or either of them, and that said sureties have never known of the said alterations being made in said bond until this suit was commenced thereon, and have never ratified, confirmed, or sanctioned said alterations, or any of them, and that said pretended bond is void as to said sureties, and each and every of them.

Further answering, said defendants deny that said Potter ever legally received any money as such receiver of said land-office that he did not account for to the United States, and they deny that said Potter was or is a defaulter to the United States as alleged in said complaint, or in any other manner whatever to the amount stated in said complaint, or in any other sum or amount whatever. They aver that every dollar that said Potter legally received as such receiver of the said United States land-office, he accounted for to the United States. They aver and charge that as to all the moneys charged by the United States against said Potter as having been received by him and not accounted for, that if any such moneys there were,
19 they were not legally received by him as such receiver, but in his individual capacity, and not officially or in any manner connected with or authorized by his said office, and that his said sureties are not and never were chargeable with the same or any part thereof. That from about the 30th of September, 1873, there was no legal land-office at said Pembina, and that there was no legal land-office or land officers at said Pembina from said 30th day of September, 1873, to and up to the time of the last item charged by the said United States against said Potter. Defendants aver from and after said September, 1873, there never was any register at said land-office at said Pembina, and that there were no legal sales of land or receipts of moneys at said land-office for any purpose during all the time from said 30th day of September, 1873, to the end of the time that said Potter held the office of receiver of said land-office, and if any money was received at said land-office for any purpose it was fraudulently and illegally received, and by persons wholly unauthorized by law or otherwise to receive the same and is not chargeable to or against said sureties on said pretended bond or any of them.

20 Defendants deny each and every allegation contained in said complaint not hereinabove expressly admitted.

Wherefore they pray judgment that they be may hence dismissed with their costs and disbursements.

H. G. O. MORRISON &
BIGELOW, FLANDRAU & CLARK,
Said Def'ts' Att'ys.

(Endorsed:) Filed March 25, 1879. H. E. Mann, clerk.

United States circuit court, district of Minnesota.

THE UNITED STATES
vs.
GEORGE F. POTTER ET AL.

It is hereby stipulated that a jury trial is waived in said action, and that the same is to be tried by court at five days' notice by either party.

WM. W. BILLSON, *Att'y for Pl'ff.*
BRADLEY & MORRISON,
Att'ys for Def'ts.

E. B. AMES.
R. J. BALDWIN.

(Endorsed:) Filed April 7, 1879. H. E. Mann, clerk.

21 United States circuit court for the district of Minnesota. Term minutes December term, A. D. 1878; March 26, 1879.

Present, Hon. Rensselaer R. Nelson, judge.

THE UNITED STATES
vs.
GEO. F. POTTER, DORILUS MORRISON, ELI B. Ames, William S. King, Rufus J. Baldwin, & William Windom.

This cause this day came on for trial before the court without a jury, a trial by jury having been waived by stipulation of the parties in writing.
W. W. Billson, esq., U. S. dist. att'y, appeared for the plaintiff.
Chas. E. Flandrau, esq., & H. G. O. Morrison, esq., " " defendants.
The plaintiff introduced documentary evidence and rested.
W. S. King is sworn & examined as a witness for defendant.
E. B. Ames " " " " " " "
T. G. Potter " " " " " " "
And here the defendants rest their case.
The case is submitted to the court and taken under advisement.

22 U. S. circuit court Minnesota district, April 10, 1879.

THE UNITED STATES
vs.
GEO. F. POTTER ET ALS.

W. W. Billson, U. S. dis. attorney for U. S.
Bigelow Flandrau & Chas. K. & H. G. O. Morrison, for defendants.

NELSON J: The principle settled in Dair vs. U. S., 16 Wall., 1, and Butler vs. U. S., 21 Wall., 272, controls the point raised by the defense that the bond is not a valid obligation. The sureties must be held to have consented that the blanks should be filled as they were and now appear in the bond, and are not discharged by signing it in blank.

II. There is nothing in the statute requiring the presence of both register and receiver upon proof of settlement & improvement by pre-emptors, R. S. U. S., sec. 2263. Proof can be taken in the presence of the receiver only, and if afterwards sanctioned by the register is "made to the satisfaction" of both officers in compliance with the law (9 Howard, 315). Moneys
23 paid to the receiver for cash sales, pre-emption, homestead, & railroad entries, could be received by him notwithstanding the absence of the register, and the sureties are liable for the moneys which thus came into his hands, & which he has failed to pay over.

"The provisions of statute requiring monthly settlements are for the security and protection of the government, and to regulate the conduct of receivers of public moneys, and form no part of the contract with the sureties." (12 Wheaton, 509, & cases cited.)

III. The receiver has reported to the proper authorities & charged himself with the amount of four thousand three hundred & forty-one $\frac{48}{100}$ dollars ($4,341.48) received for cash sales, pre-emption, homestead, & rail-

road entries after Sept. 30, 1873; and there being no evidence to show these reports false, or the moneys not received for the sales & entries reported, the sureties are bound thereby, and it being admitted that the receiver was indebted to the U. S. in the sum of two thousand & fifty-four dollars & $\frac{82}{100}$ Sep. 30, 1873, judgment must be entered against the defendants for the non-payment in the sum of six thousand four hundred
24 & six dollars & thirty cents ($6,406.30), with six per cent. interest from June 30, 1874, with costs.

(Endorsed:) Decision filed Ap'l 12, 1879. H. E. Mann, clerk.

United States circuit court for the district of Minnesota. Term minutes, December term, A. D. 1878, Ap'l 12, 1879.

Present, Hon. Rensselaer R. Nelson, judge.

UNITED STATES OF AMERICA
vs.
GEORGE F. POTTER, DORILUS MORRISON, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom.

This cause having been tried before the court without a jury and submitted by the court and taken under advisement; now, the court being fully advised in the premises and having filed its decision and findings in writing, it is ordered pursuant thereto, that judgment be entered in favor of the plaintiff, and against the defendants for the sum of six thousand four hundred and six dollars and thirty cents, ($6,406.30) with
25 six per cent. interest thereon, from June 30, 1874, besides costs.

United States circuit court for the district of Minnesota. Term minutes. June term, A. D. 1879, September 19, 1879.

Present, Hon. Rensselaer R. Nelson, judge.

THE UNITED STATES OF AMERICA
vs.
GEORGE F. POTTER, DORILUS MORRISON, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom.

The defendants present their bill of exceptions, which is duly settled and signed. The defendants prayed an appeal to the Supreme Court of the United States, which is allowed, and the amount of a supersedeas bond is fixed by the court at ten thousand dollars.

26 *Bill of exceptions.*

Circuit court of the United States for the district of Minnesota.

THE UNITED STATES
vs.
GEORGE F. POTTER, DORILUS MORRISON, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom.

The above-entitled action came on for trial before the Hon. R. R. Nel-

son, judge of said court, without a jury, a jury having been duly waived by the parties thereto.

The plaintiff, to sustain the issues on its part, offered in evidence certified copies of the accounts of the said George F. Potter, receiver of the United States land-office at Pembina, which showed against him the following balances:

For the quarter ending September 30, 1873, a balance of $2,054.82, against which the defendants made no objection, and admitted that they were liable for that amount of deficit.

The plaintiff also offered certified copies of report of said Potter of his accounts for quarter ending December 31, 1873, in which said Potter admits against him a balance of $3,062.63, and in which there is a balance claimed against him by the government of $4,669.86, which is made up as follows: He is charged with a certificate of deposit No. 4366 on First National Bank of St. Paul, to credit of Walter S. Trail,
27 for $1,607.23 on account of its not being received by the government.

The plaintiff also offered in evidence certified copies of the reports of said Potter for the quarter ending March 31, 1874, in which were charged against him the balance of the last quarter of $4,669.86, and the following items:

Land sales this quarter	$985 82
Homesteads commuted	393 98
Fees on 16 homestead entries	160 00
Commissions on 2,471.77 acres	65 45
Fees on 75 pre-emption filings	150 00
Do. on 3 homestead "	6 00
Do. on R. R. selections	47 16
Balance	$6,478 21

The plaintiff also offered in evidence certified copies of the account of said Potter for the quarter ending June 30, 1874, which showed as follows:

Above balance on last quarter	6,478 27
From sales of lands	1,630 96
Homesteads commuted	100 00
Fees on homestead entries	70 00
Commissions on the same	27 54
Fees on 127 pre-emption filings	234 00
Fees on 10 homestead filings	20 00
Fees on 2 homestead filings	4 00
Balance	8,564 77

28 Here the plaintiff rested.

The defendants then proved that the register of the land-office at Pembina aforesaid, from the summer of 1871 until the expiration of the term of office of said Potter as receiver, was Lewis B. Brasher; that said Brasher was not present at the said land-office more than one-third of the time, up to September 23, 1873, and that after September 23, 1873, he was never there at all; that on the 23d of September, 1873, said

Brasher left Pembina and said land-office and never returned, but continued to hold his said office of register during Potter's full term of office; that before leaving he signed a large number of printed blanks, covering all the various business of the register of said land-office, and left them with one William R. Goodfellow, who was a clerk in the custom-house in said Pembina, and had nothing to do with said land-office, except that he was authorized by said Brasher to act for him in his absence, and that all the business of said land-office, so far as the said register was concerned, was done by said Goodfellow, with the said blanks so signed by said register as aforesaid.

That the said receiver, George F. Potter, left said Pembina and said land-office on the 8th or 9th of April, 1874, and did not return
29 until the last of June or the beginning of July, 1874, and that no one was in charge of said land office while said receiver was gone except said Goodfellow; that on the return of said Potter he received no money from said Goodfellow on account of said office, and that he did receive from his son the sum of $200 or 300.00 and no more; that Goodfellow took in, during the absence of said Potter, some $1,400 of money belonging to said land-office and paid the same over to said son of said Potter, from whom it was all stolen except the $200 or $300 which was paid over by him to said Potter.

That when said Potter left in April he did not authorize any one to sign his name except to conditional or provisional receipts, which were to be replaced on his return by receipts signed by himself, but that said Goodfellow did sign said Potter's name to all the papers required in the transaction of the business in said land-office during said Potter's absence.

Defendants also proved that there were no private entries of land at said land-office of Pembina during the term of office of said Potter.

That after said Brasher left said land-office as aforesaid, there
30 were documents that needed his signature in the general course of the business of said office, for which he had not signed blanks, and these documents were signed by said Goodfellow or Frank D. Broodwell who had nothing to do with the land-office except as a friend of the register, and that every act of the register which appers to have been signed by him, after the time when he left as aforesaid, was signed in blank by him as aforesaid, or was signed by one of the persons above named for him.

The counsel for the defendants, Morrison, Ames, King, Baldwin, and Windom, the sureties of the said defendant Potter, insisted that upon this evidence they were not chargeable with or liable for any moneys received at said land-office for any business done therein in the absence of either the register or the receiver of said land-office, and that as it appeared that all moneys that had been received at said land-office after the quarter ending on the 30th of September, 1873, had been received in the absence of the register, and for business done at said office during the absence of said register and by persons unauthorized to do such business, or to receive any such moneys the said defendants, as sureties of said receiver, were
31 not liable therefor or for any part thereof.

The court overruled said objections, and the counsel for the said defendants duly excepted to the ruling and decision of the court.

And because the above matters do not appear of record in said action, the judge who tried the same, having found the same conformable to the truth, has signed and sealed this bill of exceptions this 18th day of September, 1879.

R. R. NELSON, *Judge.* [L. S.]

(Endorsed:) Filed Oct. 2, 1879. H. E. Mann, clerk.

32 United States circuit court, district of Minnesota.

THE UNITED STATES
vs.
GEO. F. POTTER, DORILUS MORRISON, ET ALS.

Plaintiffs' statement of costs & disbursements.

Statute costs	10 00
Marshal's fees	19 03
Clerk's fees (to be added)	15 35
Costs taxed at	$44 38

Sept. 30, 1879.

H. E. MANN, *Clerk.*

DISTRICT OF MINNESOTA, *ss:*

Wm. W. Billson, being duly sworn, says he is a U. S. attorney in and for said district; that the foregoing statement of costs and disbursements in this action is correct, and that all the items of disbursements charged therein have been actually & necessarily paid or incurred.

WM. W. BILLSON.

Subscribed & sworn to before me this 29th of Sept. 1879.

H. E. MANN,
U. S. Commissioner, District of Minnesota.

(Endorsed:) Filed Sep. 30, 1879. H. E. Mann, clerk.

33 United States circuit court for the district of Minnesota. Term minutes, June term, A. D. 1879, September 30, 1879.

Present Hon. Rensselaer R. Nelson, judge.

THE UNITED STATES OF AMERICA
vs.
GEORGE F. POTTER, RUFUS J. BALDWIN, Dorilus Morrison, William S. King, Eli B. Ames, and William Windom.

This cause having been tried before the court without a jury, trial by jury having been waived by stipulation of the parties in writing on file, and the court having on the 12th day of April, 1879, filed its decision and findings, and ordered pursuant thereto that judgment be entered in favor of the plaintiff and against the defendants for the sum of six thousand four hundred and six dollars and thirty cents ($6,406.30) with six per cent. interest thereon from June 30, 1874, besides costs. Now, the plaintiff, by Wm. W. Billson, esq., its attorneys, moving for judgment, and the

clerk of said court under direction of the court computing said interest on said sum to this date and ascertaining the same to be the sum of $2,017.98, making with said sum of $6,406.30, the sum of $8,424.28, thereupon it is by the court considered, ordered, and adjudged
34 that the plaintiff do have and recover of and from the defendants the said sum of eight thousand four hundred and twenty-four dollars and twenty-eight cents ($8,424.28) besides its costs by it in and about its suit in this behalf expended, taxed at $44.38, and that the plaintiff have execution therefor.

Judgment record signed this 30th day of September, A. D. 1879.

H. E. MANN, *Clerk.*

Damages $8,424.28; costs, 44.38—total $8,468.66.

(Endorsed:) Judgment roll. Filed October 11, 1879. H. E. Mann, clerk.

35 Circuit court of the United States, district of Minnesota.

THE UNITED STATES
vs.
GEORGE F. POTTER, DORILUS MORRISON, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom.

Know all men by these presents, that we Dorilus Morrison as principal, of the city of Minneapolis, in the State of Minnesota, and Clinton Morrison and George H. Morrison, of the same place, as sureties, are held and firmly bound unto the United States of America in the sum of ten thousand dollars, to be paid to the said United States of America or its assigns; to which payment well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals and dated this 4th day of October, A. D. 1879.

Whereas the above-named defendants, George F. Potter, Dorilus
36 Morrrison, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Minnesota.

Now, therefore, the conditions of this obligation is such that if the above-named George F. Potter, Dorilus Morrison, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom shall persecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise it shall remain in full force and virtue.

DORILUS MORRISON. [L. S.]
CLINTON MORRISON. [L. S.]
GEO. H. MORRISON. [L. S.]

Sealed, signed, and delivered in presence of—
H. B. WHITMORE.
J. H. BUTLER.

STATE OF MINNESOTA,
County of Hennepion, ss:

Clinton Morrison and George H. Morrison, being first duly sworn, doth each *each* for himself depose and say that he is one of the sureties in the above bond and signed the same. That he is a resident and freeholder of the State of Minnesota, and is worth the sum of twenty thou-
37 sand dollars over and above his debts and liabilities and exclusive of property exempt of execution.

DORILUS MORRISON.
CLINTON MORRISON.
GEO. H. MORRISON.

Subscribed and sworn to before me this 4th day of October, 1879.
[SEAL.] H. G. O. MORRISON,
Notary Public, Hennepin County, Minn.

(Endorsed:) Bond.
I hereby approve the within bond and the sureties therein named, and allow a writ of error in said action.
Oct. 4, 1879.

R. R. NELSON, *Judge.*

Filed October 4, 1879. H. E. Mann, clerk.

38 *Assignment of errors.*

Circuit court of the United States for the district of Minnesota.

THE UNITED STATES
vs.
GEORGE F. POTTER, DORILLUS MORRISON, Eli B. Ames, William S. King, Rufus J. Baldwin, & William Windom.

And now comes the said above-named defendants, by Bigelow, Flandrau & Clark, and H. G. O. Morrison, their attorneys, and say that in the record and proceedings in the said court in the said above-entitled action, and also in the giving the judgment in said action, there is manifest error in this, to wit: That when the defendants' counsel on the trial claimed that the court should not hold the sureties of said defendant Potter liable for any moneys received at said land-office in the absence of the register thereof, and after the quarter ending on the 30th of September, 1873, the court should have sustained the position and claim of said defendants so
39 made, and not have allowed any claim against said sureties for any money so received at said office after the said quarter ending September 30, 1873, and should not have rendered judgment against said defendants for any moneys so received after said last-named date. And said court erred in overruling said defendants' objections to such recovery and judgment against them.

And said defendants pray that the judgment aforesaid so rendered against them in this action, for the errors aforesaid, and for the other many and manifest errors in said record and proceedings aforesaid, may be reversed,

annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of said judgment.

BIGELOW, FLANDRAU & CLARK,
H. G. O. MORRISON,
Attorneys for Defendants.

(Indorsed:) B 200. Law. Circuit court U. S., Minnesota. The United States vs. George F. Potter et als. Assignment of errors. Filed Oct. 9, 1879. H. E. Mann, clerk. Bigelow, Flandrau & Clark, H. G. O. Morrison, def'ts' att'ys.

40 UNITED STATES OF AMERICA,
District of Minnesota:

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the third Monday of the October term of 1879, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein George F. Potter, Dorillus Morrison, Eli B. Ames, William S. King, Rufus J. Baldwin, and William Windom, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 4th day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

R. R. NELSON, *Judge.*

41 (Indorsed:) B. 200. Law. Circuit court of the U. S., dist. of Minnesota. The United States vs. George F. Potter et als. Citation.

Due personal service of the within citation is hereby admitted this 4th day of October, A. D. 1879.

WM. W. BILLSON,
U. S. Attorney, Dist. of Minnesota.

Filed Oct. 4, 1879. H. E. Mann, clerk.

(Indorsement on cover:) No. 127. George F. Potter, Dorillus Morrison, E. B. Ames, W. S. King, R. J. Baldwin, & William Windom, plaintiffs in error, vs. The United States. Minnesota C. C. U. S. Filed 27th October, 1879.

17-126

SUPREME COURT U.S.
FILED
OCT 1882
JAMES H. MCKENNEY, CLERK

SUPREME COURT of the UNITED STATES.

GEO F. POTTER, DORILLUS MORRISON, ELI B. AMES,
WILLIAM S. KING, RUFUS J. BALDWIN,
and WILLIAM WINDOM,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

ERROR to CIRCUIT COURT of the UNITED STATES, DISTRICT of MINNESOTA.

CHAS. E. FLANDRAU,
H. G. O. MORRISON,
Counsel for Plaintiffs in Error.

Printing House O. G. Miller. St. Paul.

SUPREME COURT of the UNITED STATES.

GEO. F. POTTER, DORILLUS MORRISON, ELI B. AMES, WILLIAM S. KING, RUFUS J. BALDWIN and WILLIAM WINDOM,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF AND POINTS AND AUTHORITIES OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This is an action on the official bond of George F. Potter, who was the Receiver of the United States Land Office, at Pembina, in the Territory of Dakota. The suit is against Potter and his sureties; and the breach charged is that he did not pay over to the United States certain moneys which came into his hands as such receiver.

The amount claimed in the complaint is $8,564.77, with interest thereon from June 30th, 1874.

The condition of the bond is as follows:

"Now, therefore, if the said George F. Potter has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of said office according to law, then the above obligation to be void," etc.

Record, p. 3.

The sureties all unite in an amended answer, in which they claim that said defendant Potter is not a defaulter, and aver that he paid over to the United States every dollar that he legally received as such receiver, and aver that as to all the moneys charged to have been received by said Potter and not accounted for, that he did not receive them in his official capacity, but as an individual, and for which moneys so received his official sureties are in no way bound.

They also aver, that from about September 23, 1873, there was no legal land office at Pembina up to the last item charged in the accounts of said Potter, because, as they allege, the register of said land office left Pembina at about that time, and never returned during the term of office of said Potter, and that no moneys were legally received by said Potter during that time as such receiver, and none for which his said sureties were in any way chargeable.

On the trial of the cause it appeared in evidence that there was a balance against said Potter, for the quarter ending September 30, 1873, of $2,054.82, and for this sum the defendants admit their responsibility.

See record, p. 11.

It also appeared that the register of the said land office during the term of said Potter, was Lewis B. Brasher, and that after September 23, 1873, the said register left the office and never returned during all the time Potter was in office.

See record, pp. 11 and 12.

It also appears that when he left he signed blanks for all the business of the office, and left them with a party named Goodfellow, who was a clerk in the custom house, and had nothing whatever to do with the land office, and that all the business that was done at the land office after September 23, 1873, so far as the register was concerned, was done by said Goodfellow with these printed blanks.

Record, page 12.

It further appeared that the receiver, Potter, left Pembina on the 8th or 9th of February, 1874, and did not return until the last of June, 1874, and that during all this time there was no representative of the United States at Pembina at all, except the irresponsible parties Goodfellow and the son of Potter, and during all this time there was received by Goodfellow, representing the register, not receiver, $1,400 of money ostensibly belonging to said land office, which he turned over to Potter's son, from whom it was all stolen but $200 or $300, which balance was by the son turned over to Potter on his return.

Record, page 12.

The court, on these facts, rendered judgment against the defendants, sureties of Potter, for the sum of $6,406.30, with interest at six per cent. from June 30, 1874, with costs.

Record, page 13.

ARGUMENT.

Our position is this: That as sureties of the receiver, we are only responsible for such funds as came into his hands *legally as receiver*, and for which he failed to account. We were not sureties for him in any way, nor responsible for him in any capacity except as receiver. What moneys he received outside of his official duties in no way concerns us. We therefore admitted on the trial, that the balance against him for the quarter ending September 30, 1873, of $2,054.82, was properly chargeable to us as his sureties, but we deny that any money that came into his hands after that time, in the absence of the register, (and as in the case of the $1,400 received when there was neither register nor receiver present,) was legally received, and we claim that as to all such moneys we are not liable.

It will not be disputed that the relation of a surety to his principal is to be construed *strictissimi juris*, that nothing can be taken against him by implication or inference, nor can his liability be extended, and that all doubts are to be resolved in his favor.

Miller vs. Stewart, 9 Wheat. 681.
Leggett vs. Humphreys, 21 How. 67.
U. S. vs. Smith, 2 Wall. 219, opinion, 235.

Keeping this rule in mind, we will look into the receipts of money by Potter, which the United States seeks to charge against the defendants, his sureties. The items of receipts are made up of money for land sales, homesteads commuted, fees on homestead entries, commissions on sales of land and fees on pre-emption entries and railroad selections.

Now we claim that Potter, as receiver, had no right to receive

a dollar of these moneys in the absence of the register, and that all receipts of moneys by him for these purposes were illegal and did not bind the United States, after the departure of the register on September 23d, 1873, and were personal and not official receipts, for which his sureties were not liable.

Let us look at the item of land sales. It is distinctly stated in the bill of exceptions, that there were no private entries of lands at this office during said Potter's term of office, *record, page 12*, so that all sales of land must have been by pre-emption or commutation of homesteads, which is about the same thing Now, what right has a receiver to take money in such cases?

We will first look at pre-emption entries which is regulated by *Section 2259 to Section 2262, inclusive* of the United States Revised Statutes. These sections prescribe what shall be done to acquire the privileges of an entry by pre-emption, and who may, and who may not enjoy the right.

Then follows *section 2263*, which provides that "prior to any entries being made under and by virtue of the provisions of *Section 2259*—proof of the settlement and improvement thereby required, shall be made *to the satisfaction of the register and receiver* of the Land District in which such lands lie," &c.

The court will see that *no money can be received* on a pre-emption entry, until all the prerequisites are complied with, and that they cannot be complied with in the absence of either the register or receiver, so that a payment by a settler to a receiver under any other circumstances than those contemplated by the statute, would not be a payment to the United States, but an unauthorized and unofficial payment to the receiver, which the settler could at any time recover from him, and which the United States could not recover from him.

The court will see that our view upon this point is very much

strengthened by *Section 2270*, which qualifies the law as to the time within which certain acts must be done, by providing—

"That whenever the vacancy of the office either of register or receiver, or of both, renders it impossible for the claimant to comply with any requisition of the pre-emption laws within the appointed time, such vacancy shall not operate to the detriment of the party claiming in respect to any matter essential to the establishment of his claim, but such requisition must be complied with within the same period after the disability is removed, as would have been allowed had such disability not existed."

It is true this section speaks of a vacancy existing, but it shows clearly that both the officers must be present when any of the requisites of a pre-emption are established. The same difficulty exists in establishing any of the statutory requisites of a pre-emption when the register is absent, as when the office of register is vacant. He is not there in either case, and the last section quoted, declares that the absence of either officer, "renders it impossible for the claimant to comply with any requisition of the pre-emption law." He certainly could not pay for the land in the absence of the receiver, nor could he prove up in the absence of the register.

But the act itself sheds further light on its own meaning and construction in *Section 2287*, which provides as follows:

"Any *bona fide* settler under the homestead or pre-emption laws of the United States who has filed the proper application to enter, not to exceed one quarter section of the public lands in any district land office, and who has been subsequently appointed a register or receiver, may perfect the title to the land under the pre-emption laws by furnishing the proofs and making the payments required by law to the satisfaction of the Commissioner of the General Land Office."

The court will see that this section proves our position in two ways. *First*, it is only a person who has filed the proper application to pre-empt, *before* receiving such appointment, who can avail himself of this provision; showing that it required the two officers free from interest, even to receive the application, and that neither of such officers could receive the application of the other while he was in commission; and *Second*, that even where one of them had filed before being appointed, neither could act upon any of the matters necessary to be established to the satisfaction of both. So the whole thing, both proving up and paying, must be done before another officer,—the Commissioner of the General Land Office.

If this is not the meaning of the law, why not allow the receiver to receive the money when the register pre-empted and require the proofs only to be made before the Commissioner of the General Land Office? The reason is clear. These officers are a joint tribunal. They are a court of two, and there can be no business done without the presence and action of both. It takes them both to make a quorum. They must both be satisfied of every essential act in the proving up and paying for a pre-emption claim, or any other of their duties of a similar character.

We have been unable to find any express judicial adjudications by this court or the State courts on this point, but we find the opinion of Attorney General Caleb Cushing, of date of March 7th, 1856, published in *1 Lester's Land Laws at page 337*, which is exactly in point and coincides with our views. After showing that registers and receivers may purchase public lands at their own office which are subject to private entry, he decides that neither of them can purchase by pre-emption in the following words.

"No. 389.

Syllabus.—Purchase of public lands by registers or receivers; registers by express terms of statute, and receivers by legal construction, may purchase public lands at private entry. But neither registers nor receivers can purchase such lands by pre-emption within their respective districts.

ATTORNEY GENERAL'S OFFICE,
March 7, 1856.

* * * "As to pre-emption purchase by either receivers or registers, although not expressly forbidden by statute, still it appears to me inadmissible by the general principles of law and of statutory construction.

By the general law all pre-emption claims must be adjudicated in the first instance by the register and receiver.

See Act of September 4, 1841, Sec. 12. 5 Stat. at Large, p. 546.

No. 48.

There is no statute which provides a substitute for either of them in a case of purchase made by himself. It is clear that, by the rules of law and of right neither of them can be judge in their own case.

Michaud vs. Girod, 4 Howard 503, 553.

Of course he cannot make proof of pre-emption. If he possess any right of pre-emption, it must remain in abeyance until means of adjudication be provided by Congress.

I have the honor to be very respectfully,

C. CUSHING."

Hon. ROBERT MCCLELLAND,
Secretary of the Interior.

There is but one adjudicated case in the Federal Courts that we have been able to discover bearing on this point, of the necessity of the presence of both the register and receiver at the performance of any of their official acts, which is the case of *Lytle vs. State of Arkansas, 9 How. 314.* This case is cited by *Judge Nelson* in his opinion in the case at bar, to prove that the presence of both the register and receiver was not necessary.

We think the learned Judge misapprehended the decision in that case, and we claim that it is an authority in our favor, and proves, that under the law as it existed when the case at bar was decided, the presence of both the officers was absolutely necessary to the validity of an official act, and especially such an act as the proving up of a pre-emption claim.

The case arose under the pre-emption acts of 1830 and 1831, at which time registers and receivers had not the power to administer oaths. But as is said in the opinion of the court in that case, the proofs were taken before a justice of the peace. *See page 332 of the opinion*, where the court says in quoting from the instructions of the Commissioner: "The evidence must be taken before a justice of the peace in the presence of the register and receiver." On the same page of the opinion the court says: "The *law* did not require the presence of the land officers when the proof was taken, but, in the exercise of his discretion, the commissioner required the proof to be so taken. Having the power to impose this regulation, the commissioner had the power to dispense with it, for reasons which might be satisfactory to him." It further appears that the presence of the register only was held sufficient, and that the United States got the money for the land. So the case is entirely different from the one at bar, as we will show.

By the act of June 12, 1840, *Revised Statutes, U. S. 2246*, the

registers and receivers are authorized to administer oaths, and it is made their duty to administer them in all cases "in connection with the entry or purchase of any tract of the public lands."

From this time forward the proofs have always been taken before the register and receiver and on oaths administered by them. We find but one exception to this rule, and that is in certain cases under the Homestead law, which are entirely exceptional, and have no application to pre-emption entries.

See section 2294, U. S. R. S.

Now if we are right that the proofs are required *by law* to be taken before the register and receiver, then there exists no discretion in any officer of the government to dispense with such law, and the case in *9 Howard 314*, before cited, becomes an authority for us instead of against us, because the court placed its decision in that case upon the point, that the absence of the receiver at the taking of the proofs, had been waived by the Commissioner who had a right to waive it. Had the law required the presence of both officers, the decision would have been the other way on this point.

But should this court decide that the mere physical presence of both officers was not necessary at the taking of the proofs, which were the foundation of the entries with which we are charged, then we insist that the judgment of both of them was absolutely necessary to the decision on the proofs in each case, and to all subsequent acts, before the payment of the purchase money to the receiver could be legally made, and as it positively appears in the case that the register was never at the office from September 23, 1873, to the end of the receiver's term of office, there could not have been any money legally received at the office for sales of lands, or any fees growing out of such sales, whether they were made by pre-emption or homestead.

We lay before this court a decision of the Secretary of the Interior, who possesses judicial powers in such cases, which is exactly in point in holding that receipts of money by receivers under the circumstances which appear in this case, are illegal and void. That the United States will not be responsible for them, will not recognize them or pay them back, and that the sureties of the receiver are not liable for any such moneys. We do not claim for this opinion the full force of a binding judicial decision, but we claim for it the force and effect of a decision of one of the highest officers of the government, made in a case in which he had full jurisdiction, and which has been published for the guidance of land officers, and citizens transacting business with them and going on their bonds, as the law of such cases, and it as such should have great weight in this court in estopping the United States from claiming the contrary. We further claim for it, as we would for any opinion rendered by a court, the authority of which is not conclusive, that it commends itself to acceptance upon its reasoning, and as being in accord with the decisions of the courts involving the same principles.

The decision is found published in *1 Lester's Land Laws, at pages 671-2*, and is in the following words:

"No. 669.

Syllabus.—"A claimant for repayment of purchase-money who failed to fill a written application to purchase, not entitled, nor are the receiver and his sureties liable in this case.

DEPARTMENT OF THE INTERIOR,
March 8th, 1852.

"In the case of John H. C. Meyer, submitted in your letter of

the 17th of June, 1850, and to which my attention has been called by a letter from the Hon. A. C. Dodge dated the 25th ultimo, it appears that said Meyer paid to the receiver of public moneys at Dubuque, Iowa, without having previously filed with the register an application or memorandum in writing as required by the act of 24th of February, 1810, the sum of $100 which the receiver omitted to pay over to the United States, or otherwise to account for; the land so paid for being found to have been previously sold. Mr. Meyer asks that the government will refund to him his purchase money, but inasmuch as the receiver's accounts have been settled and closed, and he since dead, and his estate represented to be insolvent, you submit the question whether Mr. Meyer can maintain an action of covenant against the receiver and his sureties under his official bond, for the recovery of the money paid. In reply I have to state that the money cannot be refunded to Mr. Meyer by the United States, for two reasons: First, because it was never paid into the Treasury of the United States, and Second, that as the claimant failed to observe the prerequisites of the law, the payment made by him to the receiver was not a legal payment for which the United States is responsible, or for which the receiver and his sureties are liable, under his official bonds; and I am of the opinion also, although that is a judicial question, which can be determined only by the courts, that Mr. Meyer cannot maintain an action against the receiver's sureties under his bond, the conditions of the bond having been complied with by the receiver accounting to the United States for all the money which legally came into his hands. Had the claimant complied with the law, by making application in due form, &c., the United States would be bound to repay to him the amount paid by him to the receiver, and look to the receiver or his sureties for the

amount. The receipt of the money under such circumstances, would have been an official act, within the pale of the receiver's authority, which would have been covered by the official bond and binding on the United States. But the fault was with the claimant, in not observing the requirements of a public statute, the ignorance of which, however hard it may appear in particular cases, cannot be admitted as a ruling principle.

I am, &c.,

A. H. H. STUART,
Secretary,
Commissioner of the General Land Office."

Upon the point that the sureties of a public officer are not liable for acts of their principal done outside of his official duties, even if done *colore officii*, we cite—

Ex-parte Reed, 4 Hill. 527.
The Governor vs. Hancock et al. 2 Ala. 728.
The State of Ohio vs. Medary, 17 Ohio, 554.

All that has been said on the subject of moneys received by this defaulting receiver in regard to pre-emptions, applies equally to moneys received on homestead entries; there is no substantial difference in the law governing these two ways of acquiring public lands. The whole subject of homesteads is found in *Chapter 5, of the U. S. Revised Statutes, from page 421 to to 426 inclusive.*

We do not see how, under any circumstances, these sureties can be charged with the $1,400 taken in between April 9, 1874, and July, 1874, while Potter, the receiver, was away, and there was no one at the office but Goodfellow, who had no authority to perform any of its duties, and who placed the money so re-

ceived by him in the hands of a son of Potter, from whom it was all stolen, except some $200 or $300.

The judgment should be reversed, or modified to the sum of $2,054.82, which is the balance due from Potter to the plaintiff for the quarter ending September 30, 1873, and for which sum the defendants did not dispute their liability.

CHAS. E. FLANDRAU,
H. G. O. MORRISON,
Counsel for Plaintiffs in Error.

17-126

OFFICE SUPREME COURT U. S.
FILED
DEC 12 1882
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

POTTER ET AL.
vs.
THE UNITED STATES. } No. 127.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

POTTER ET AL.
vs.
THE UNITED STATES. } No. 127.

BRIEF FOR THE UNITED STATES.

This is an action on the official bond of George F. Potter, receiver of the United States land office at Pembina, Dakota.

Undoubtedly the jurisdiction of this court vested under the writ of error in this case, but as the record does not make a presentation of the case in the mode required by law, the only way in which that jurisdiction can be exercised is by an affirmance of the judgment.

The whole matter of law and fact was submitted to the court. (R., p. 8.)

On the 26th March, 1879, the case was tried and held under a *curia advisari vult.* (R., p. 9.)

On the 10th April, 1879, the court filed an opinion deciding for the government and directing judgment to be entered for $6,406.30, with interest at 6 per cent. from June 30, 1874, with costs. (R., pp. 9, 10.)

On the 12th April, 1879, the following entry was made in the case:

> This cause having been tried before the court without a jury and submitted by the court and taken under advisement; now, the court being fully advised in the premises, *and having filed its decision and findings in writing*, it is ordered, pursuant thereto, that judgment be entered in favor of the plaintiff and against the defendants for the sum, &c. (R. p. 10.)

These proceedings took place at December term, 1878.

Afterwards, to wit, at June term, 1879, on the 19th of September, 1879, the defendants tendered their bill of exceptions, and the same was signed and sealed by the court. (R., pp. 10–13.)

If the matter of the bill of exceptions was the finding of the ultimate facts of the case, in the nature of a special verdict, the mere fact that the needless instrumentality of a bill of exceptions had been employed to bring the case here would not, perhaps, make any difference, but the difficulty is that the matter of the bill of exceptions does not purport to be anything more than a presentation of all the evidence in the case, as plainly appears towards the conclusion of the bill, where it is stated that the counsel for the sureties "insisted that *upon this evidence* they were not chargeable, &c." No reference whatever is made to this paper in the opinion of the court (pp. 9, 10), or in the entry of judgment (p. 10). But in the entry of judgment the court does refer to "its decision and findings" *already filed;* that is to say, the opinion filed on the 12th April, 1874 (pp. 9, 10). The bill of exceptions was not tendered until *five* months after the filing of the court's opinion and the entry of judgment.

It is true that no exception was noted at the term at

which the case was tried, and that the bill was not tendered until a subsequent term, but that might not make any difference if the facts found had been stated in the bill and the object of the bill had been to amend the record by substituting a special for a general finding, as in Insurance Co. *v.* Boon (95 U. S., 118), but no such purpose is anywhere alleged.

When the court is asked to rule, as stated in the bill of exceptions, that upon the whole evidence the sureties are not liable, how can this court know that the action of the court below was not based on want of belief in some of the evidence in the case? And how can this court pass upon the point presented without making a finding of fact?

The bill of exceptions, if otherwise proper, was not tendered in season, as already stated, and is wholly inoperative, as this court has repeatedly held. (Ins. Co. *vs.* Boon, 95 U. S., p. 127.)

It is submitted that in this state of things the judgment cannot be reviewed, as this court has time and again held.

But suppose the court can go into the merits of the case, which is hardly possible from the state of the record, we submit that there is no ground for reversal.

It is strenuously and confidently insisted by the plaintiff in error that no receipts of money growing out of pre-emption entries between the 30th September, 1873, and the expiration of Potter the receiver's term of office, can be recovered from the receiver's sureties, because Lewis B. Brasher, the register, was not present in the Pembina land office at all during that period.

This contention is based on § 2263 R. S., which, it is insisted, makes it essential to the validity of a pre-emp-

tion entry that the proof as to settlement and improvement required by that section should be made before the register and receiver, sitting and acting together as one tribunal. This interpretation is founded on the words of the section, that the proof required "*shall be made to the satisfaction of the register and receiver of the land district*" in which lie the lands embraced in the entry.

The learned judge of the court below held that the law

> Did not require the presence of both register and receiver upon proof of settlement and improvement by pre-emptors, and that proof could be taken "in the presence of the receiver only, and if afterwards sanctioned by the register, is 'made to the satisfaction' of both officers in compliance with the law." (9 How., 315, p. 9.)

If the construction contended for here is correct, it is very singular that the evidence on which the register and receiver are to be satisfied, namely, the affidavit of the pre-emption claimant may be taken by the register or receiver singly. Can it be necessary to the validity of the acts of such officers that they should consider together, and not singly, evidence adduced before either one of them?

What the law requires is, that the conditions necessary to a pre-emption entry should be shown to exist to the satisfaction of both officers, and this may be as well done before each officer singly as both together.

The most that is contended for, as shown by the record and by the brief of the plaintiffs in error, is that Brasher, the register, was absent from the land office from the 23d of September, 1873, until the close of the receiver's term of office; but it is nowhere intimated that all acts done by the receiver in the period mentioned, requiring the action of both officers, were not fully concurred in by the then register or his successor in

the several years that intervened before this suit was brought.

As the receiver could administer the oath to pre-emption claimants, his receipt of money from them, subject to the concurrence of the register, was lawful, and bound his sureties.

The same reasoning applies to all receipts of money in the interval in question in transactions in which the law requires both officers to concur, and it is submitted that the sureties of the receiver are bound for the moneys received in such cases.

Furthermore, it is admitted that the sureties are bound for a balance of $2,054.82. In addition to this the learned judge states in his opinion (pp. 9, 10) that the receiver had reported to the proper authorities and charged himself with $4,341.48 "received for cash sales, pre-emption, homestead and railroad entries after September 30, 1873," and that no evidence was adduced to show these reports to be false.

The contention of the plaintiffs in error that they are not liable for moneys paid to an agent of the receiver during his own absence from the office is a doctrine which, if recognized, would undo the government. If a public office see fit to deposit public money in the hands of an agent or servant, it is to all intents and purposes in his own hands, and the risk is with the sureties and not with the government. It would be as difficult as it is unnecessary to find authority for a principle that would seem to be laid up among axiomatic truths.

With reference to the argument sought to be drawn from section 2287, Revised Statutes (brief, p. 6), it is only necessary to remark that Congress thought it wise to withdraw questions in which the register or receiver

should be interested from the consideration of the one not interested, on account, no doubt, of the intimate relations likely to exist between these officers. This section does not lend countenance to the contention that the two officers must be personally present together to perform the acts whose valid performance is deemed necessary to charge the plaintiffs in error.

It is submitted that the judgment must be affirmed.

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